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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. [redacted] 137

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner and Appellee Below,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Respondent and Appellant Below.

No. [redacted] 138

THIRD NATIONAL BANK IN NASHVILLE,
Petitioner and Appellee Below,

v.

FIDELITY DEPOSIT COMPANY OF MARYLAND,
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

and

BRIEF IN SUPPORT THEREOF.

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FIDELITY DEPOSIT COMPANY OF MARYLAND,
Respondent and Appellant Below.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Third National Bank in Nashville, of Nashville, Tennessee, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree of that Court rendered February 9, 1946. A petition for a rehearing was denied by the Circuit Court of Appeals for the Sixth Circuit on March 11, 1946. The decree of the

Circuit Court of Appeals reversed a decree of the United States District Court for the Middle District of Tennessee which was entered on April 30, 1945.

The original suit was instituted by the Federal Savings and Loan Insurance Corporation (hereinafter called the plaintiff) against the defendant Third National Bank in Nashville (Rec. p. 1).

The Fidelity and Deposit Company (hereinafter called Intervenor) asked permission to intervene upon the ground that it also had a claim against the Bank subordinate to the claim of the plaintiff, and, with the consent of plaintiff, was allowed to intervene in the original suit (Rec. p. 64).

And although the claims are docketed as separate suits, there is only one suit brought by plaintiff in which the Fidelity and Deposit Company was allowed to intervene. The cause was treated as one suit in the argument, and in the opinions of the courts.

OPINION BELOW.

The opinion of the Court below—the Circuit Court of Appeals—filed February 9, 1946, is not yet reported and for convenience is printed in an appendix to the brief filed with this petition (App. pp. 25 et seq.).

No opinion was filed at the time the petition for a rehearing was denied.

The opinion of the United States District Court is reported in 60 Federal Supplement 110, and is found on pages 142-162 of the Record.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. Code, Section 347).

QUESTIONS PRESENTED.

The defendant Bank challenged the jurisdiction of the federal court (Rec. p. 101).

The District Court dismissed the suit for lack of jurisdiction (Rec. p. 163).

The U. S. Circuit Court of Appeals reversed the decree of the District Court, and held that federal jurisdiction existed.

The questions presented are:

Question No. 1.

Whether the Federal Court has jurisdiction of this controversy. The plaintiff claims that the controversy arises under the laws of the United States. The plaintiff makes no claim of diversity of citizenship.

The plaintiff first claimed that it was entitled to invoke federal jurisdiction on the ground that it is a corporation "wherein the Government of the United States is the owner of more than one-half of its capital stock" (28 U. S. Code, Sec. 42), although all of its stock is in reality owned by the Home Owners' Loan Corporation (Rec. pp. 1, 2).

The plaintiff later claimed (by offering to amend its Complaint, which amendment was not permitted by the District Court) that it was entitled to invoke federal jurisdiction by offering to allege that the defendant violated a federal criminal Act [12 U. S. C. A., Sec. 1731 (e)] by making a false statement to plaintiff (Rec. p. 136).

The U. S. District Court rejected both claims for federal jurisdiction and dismissed the suit for lack of jurisdiction (Rec. p. 163).

The Circuit Court of Appeals held that the allegation of violation of 12 U. S. Code, Sec. 1731 (e) was sufficient to support the claim for federal jurisdiction, and reversed the decree of the District Court (Opinion, App. p. 1).

The claim for federal jurisdiction, being based on two separate grounds, suggests two sub-heads under the question of jurisdiction:

Question 1 (a).

Whether the plaintiff has the right to invoke federal jurisdiction (under 12 U. S. Code, Sec. 42) on the ground that its capital stock is owned by the Home Owners' Loan Corporation.

The District Court answered this in the negative, and the Circuit Court of Appeals did not pass upon this point.

Petitioner agrees with the decision of the District Court and mentions the question only because it was one of the grounds urged by the plaintiff to invoke federal jurisdiction.

Question 1 (b).

Whether the plaintiff can invoke or create jurisdiction by offering to add to its Complaint, which already describes a complete local cause of action, an allegation that defendant violated a federal criminal act by making a false statement for the purpose of influencing plaintiff's action.

The District Court answered this in the negative.

The Circuit Court of Appeals reversed the District Court on this point, and held that federal jurisdiction was obtained when plaintiff offered an amendment alleging that the acts complained of violated a criminal provision of the federal Act under which plaintiff was created.

Petitioner insists that the controversy did not arise under this federal act and its construction is not necessary to the determination of the lawsuit.

As we understand the decisions of this Court, especially as set out in the case of *King Iron Bridge etc. Co. v. County of Otoe*, 120 U. S. 225, 30 Law. Ed. 623, and in the

case of *M. C. & L. M. R. Co. v. Swan*, 111 U. S. 382, the rule is inflexible that this Court will, even of its own motion, "deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act."

And we also understand the decisions of this Court to hold that a controversy does not arise under the laws of the United States unless **the construction of some federal Act is necessary to the determination of the controversy.**

The U. S. Circuit Court of Appeals did not hold that a construction of the Federal Act was necessary to the determination of the controversy. On the contrary, the Circuit Court of Appeals clearly held that the cause of action (the controversy) originally belonged to a local savings association and **was assigned** intact to the plaintiff. On this point the Circuit Court of Appeals said:

> ". . . the plaintiff restored the capital of the association by advancing to it the amount so wrongfully converted by the defendant; and in consideration thereof the association **assigned and transferred** to the plaintiff all its claims and rights of action against the Bank on account of the wrongful acts alleged." (Opinion, App. p. 27.)

The Circuit Court of Appeals apparently does not deny that the original controversy arose between a local savings association located in Nashville, Tennessee, and the defendant Bank, and that the cause of action **was assigned** to the plaintiff. This concession, we believe, destroys any claim to federal jurisdiction, as the cause of action—the controversy—was in existence without any reference to a federal statute;—and certainly no construction of a federal statute is required.

The Circuit Court of Appeals, we submit, in substance

held that **regardless of the fact that the controversy arose independent of a federal law,** as the defendant's act **also** violated a criminal provision of a federal Act, the federal court has jurisdiction. This, we believe, is not in accord with the principles set out in applicable decisions of this Court.

On this point, the Circuit Court of Appeals held:

> "The views expressed by the District Court that 'The purpose of the statute is to place a criminal penalty upon the commission of certain acts, and does not purport to confer jurisdiction upon the United States court to try any civil action arising out of the violation of the statute' and '. . . the alleged acts complained of are purely of a local nature and plaintiff's rights, if any, are fully governed by the common law and the laws of the State of Tennessee relating to conversion and fraud and deceit' **seem to entirely overlook the fact that regardless of the laws of the state or the common law,** this Act clearly and emphatically evidences the National policy to safeguard the Insurance Corporation by Federal laws to which the Corporation may resort for protection and relief. . . ."

From the above excerpt it is clear that the Circuit Court of Appeals in substance held that "even though the alleged acts complained of are purely of a local nature and plaintiff's rights, if any, are fully governed by the common law and the laws of the State of Tennessee relating to conversion and fraud and deceit . . .," the Federal Court will take jurisdiction because the alleged acts also violated a criminal provision of a federal law.

But the plaintiff is not resorting to the criminal provision of the federal law (or to any other part of the federal law) as a basis for his cause of action. And the plaintiff is not invoking the aid of the federal law to create his right of action.

The federal Act relied upon to establish federal jurisdic-

tion [28 U. S. Code, Section 1731 (e)] was enacted February 3, 1938. The cause of action is based upon alleged embezzlements of an individual (Hall) occurring during a period from May, 1937 to January, 1941 (Rec. p. 2).

THE CONTROVERSY.

The controversy is of a purely local nature. The plaintiff was organized under an Act of Congress to insure the accounts owned by persons in savings and loan associations. If a privately owned savings and loan association sustains a loss, the plaintiff reimburses the association for its loss and assesses all of the member associations to reimburse the plaintiff for such loss. 12 U. S. Code, Sec. 1727 (b).

The plaintiff brought suit against the Third National Bank in Nashville alleging that an individual, with the help of the defendant Bank, had embezzled approximately $32,000.00 from a savings and loan association; that the plaintiff had paid the loss of $32,000.00 to the local association; that the local association had assigned to the plaintiff its right of action against the defendant Bank; and that suit was now being brought upon this assignment (Rec. pp. 1-14; Amendments to complaint, Rec. pp. 31, 75).

The plaintiff at first invoked federal jurisdiction upon the theory that it is a corporation "incorporated under an act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock (28 U. S. Code, Sec. 42)."

The Government of the United States does not own any stock in the plaintiff corporation. The capital stock of the plaintiff is owned by the Home Owners' Loan Corporation (a separate, corporate entity). A majority of the stock of the Home Owners' Loan Corporation is owned by the Government of the United States.

The complaint alleges and admits that the capital stock

of the plaintiff is owned by the Home Owners' Loan Corporation, and it is upon this ownership by the Home Owners' Loan Corporation that the plaintiff based its claim for federal jurisdiction (Rec. pp. 1-2).

The defendant Bank challenged the jurisdiction of the Federal Court in its answer, and moved to dismiss the suit for lack of jurisdiction.

Upon the argument of the motion to dismiss in the District Court, the plaintiff asked leave to amend its complaint in order to allege that the suit and the questions involved arose under the laws of the United States, and alleged:

> "That as one of the bases of its claim, plaintiff shows a violation by the defendant of Title 12, U. S. C. A., Section 1731 (e) in that the defendant for the purpose of influencing the action of the said plaintiff corporation made, or caused to be made, a statement, knowing the same to be false, Title 12 U. S. C. A., Section 1731 (e)" (Rec. p. 136).

The District Court held that the allegations in the complaint and amendment were insufficient to establish federal jurisdiction and dismissed the suit for lack of jurisdiction (Rec. p. 163).

The United States Circuit Court of Appeals decided that the allegation that the defendant violated Title 12 U. S. C. A., Section 1731 (e) was sufficient to give the federal court jurisdiction (Opinion, App. p. 27).

In other words, the Circuit Court of Appeals held that the federal court has jurisdiction of this controversy—that the controversy arose under the laws of the United States,—by reason of the allegation that defendant's act, in conspiring with the employee in the embezzlement, violated that section of the Federal Statute which makes it an offense to make a false statement to the Federal Savings and Loan Insurance Corporation.

DEFENDANT'S INSISTENCE.

The defendant insisted that the controversy did not arise under this Act; that the criminal section of the Act had nothing to do with this cause of action; that no federal act is involved, and the construction of no federal act is necessary in determining this controversy.

According to the allegations in the complaint, the plaintiff has a cause of action independent of Section 1731 (e) of Title 12, U. S. Code, and independent of any federal law (Complaint, Rec. pp. 1-14).

The Circuit Court of Appeals decided that the Federal Courts have jurisdiction, and they confined their decision to one definite ground, to-wit: the allegation that the defendant aided an individual—Hall—to defraud a local association, and in so aiding the individual the defendant made a misrepresentation to the Federal Savings and Loan Insurance Corporation—a stranger to the original embezzlement, and thereby violated 12 U. S. C. A., Section 1731 (e).

This petitioner insists—and we believe it must be conceded—that the plaintiff could have had no civil cause of action against the defendant merely because the defendant made a false statement to the plaintiff. **The cause of action accrued to the local Association, and was assigned to the plaintiff.** The cause of action therefore never arose under the laws of the United States!

The violation of the federal criminal statute did not cause or create the loss, and did not give rise to the controversy. The loss was sustained by the local association, and any alleged violation of the federal statute was merely incidental to the loss. It was certainly **never necessary to construe** the federal statute, and the cause of action existed independent of the statute.

REASONS FOR GRANTING THIS PETITION.

I. The lack of jurisdiction is apparent on the face of the complaint. As the complaint shows that the controversy is based upon the claim of a local association—Fidelity Federal Savings and Loan Association—which claim has been assigned to the plaintiff, the controversy did not arise under the laws of the United States.

One convincing proof which, we believe, determines that the controversy did not arise under the laws of the United States is that the cause of action was complete and could have been maintained by the local association before the assignment to the plaintiff.

The law of the United States relied upon by the plaintiff [12 U. S. Code, Section 1731 (e)] is to prevent false statements being made **to plaintiff**; the funds were embezzled from the local association, and the local association had a **right to sue**—a cause of action—entirely independent of the federal law.

This, we submit, is irrefutable and determinative—the cause of action could have been prosecuted, before assignment, by the local association without any reference to the federal law.

And as the lack of jurisdiction has been brought to the attention of this Court, in the exercise of its appellate power this Court, we believe, will review and correct the holding of the U. S. Circuit Court of Appeals.

King Iron Bridge etc. v. County of Otoe, 120 U. S. 225, 30 Law. Ed. 623;
Mansfield R. R. Co. v. Swan, 111 U. S. 379.

II. The decision of the Circuit Court of Appeals in this case on the question of jurisdiction is not in accord with the principles of applicable decisions of this Court.

The applicable decisions of this Court hold that the controversy must arise under a federal law; that the con-

struction of the federal law must be necessary to the decision of the case.

Gully v. First Nat'l Bank, 299 U. S. 109.

The Circuit Court of Appeals, in describing the controversy, stated that the defendant Bank, pursuant to an arrangement with one Hall, made illegal charges against the Bank account of the local association and thereby converted funds of the association to apply on Hall's indebtedness to the Bank; that this claim of the association for a consideration was assigned to plaintiff, and the plaintiff brought this suit. The Circuit Court of Appeals stated that defendant **in defrauding the association** made false statements **to the plaintiff**; that a Federal Act [12 U. S. Code, Section 1731(e)] made such false statements a criminal offense; and that **upon the authority of** *Tunstall v. Brotherhood, etc.,* 323 U. S. 210, **the case arises under the laws of the United States.**

The *Tunstall* case cannot be an authority for this case. The cause of action in the *Tunstall* case was created by a Federal Act. There was no right, or controversy, or cause of action in the *Tunstall* case except the right **created by the Federal Act.**

The Circuit Court of Appeals cited **four cases,** none of which, we submit, is an authority for the decision.

In three of the cases cited and relied on in the opinion of the Circuit Court of Appeals (*Deitrick v. Greaney,* 309 U. S. 190; *D'Oench, Duhme & Co. v. F. D. I. C.,* 315 U. S. 447; and *Federal Savings & Loan Ins. Corporation v. Kearney Trust Company,* 151 Fed. [2d] 720) the question of Federal jurisdiction was not at issue, and was not considered or discussed.

In the fourth case (*Tunstall v. Brotherhood etc.,* 323 U. S. 210) the suit was filed **to enforce a right created by a Federal Act,** and this Court of course held that the controversy arose under the Federal Act.

III. The plaintiff's proposition that the stock ownership of plaintiff by the Home Owners' Loan Corporation is ownership by the United States, is a novel and important question affecting numerous corporations and numerous future suits, and this is another reason this petition should be granted.

The plaintiff urged three separate grounds to sustain federal jurisdiction, to-wit:

(1) Stock ownership by the Home Owners' Loan Corporation;

(2) The Act creating plaintiff gave it the right to sue and be sued in any Court;

(3) The violation of the federal criminal act prohibiting false statements.

The claim for jurisdiction based on stock ownership was held to be insufficient by the District Court, and the decision of the District Court on this point was not reversed.

We are not, therefore, appealing from the decision (favorable to us) that stock ownership by the Home Owners' Loan Corporation does not grant federal jurisdiction; but if the question of stock ownership is given consideration by this Court we believe it is of sufficient general importance to justify an oral argument before this Court.

The first and second grounds were not considered by the Circuit Court of Appeals. We believe none of the three grounds is sufficient to warrant federal jurisdiction. We believe that the question is of sufficient general importance and affects so many corporate entities that a consideration and decision of this Court is justified.

IV. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The opinion of the Circuit Court of Appeals, in the first paragraph thereof, states that "The only point of controversy upon this appeal is whether the plaintiff, Federal Savings and Loan Association (should be Corporation), an instrumentality of the United States, may institute and maintain this action in the Federal Court" (App. p. 1). The Circuit Court of Appeals then held that the purpose of the Federal criminal statute [12 U. S. Code, Section 1731 (e)] was to protect the plaintiff and a violation of the Federal criminal statute by defendant gave plaintiff the right to institute a civil suit, for money embezzled, in the Federal Court. This in effect holds that "an instrumentality of the United States" may bring a civil suit in a Federal Court when a federal criminal statute protecting it is violated.

Thus, the decision below leaves the law in uncertainty regarding corporations whose stock is owned by other Federal Corporations, and the determination of the question by this Court will settle this question of law and make for uniformity of decisions as to rights of litigants in such cases.

Wherefore it is respectfully submitted that this petition for the writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

JOHN J. HOOKER,
1106 Nashville Trust Building,
Nashville, Tennessee,
Attorney for Petitioner and
Appellee Below.

E. J. WALSH,
WALKER & HOOKER,
Nashville, Tennessee,
Of Counsel.

State of Tennessee, }
County of Davidson. }

John J. Hooker, attorney for petitioner, being duly sworn, makes oath that the facts stated in the foregoing Petition for Writ of Certiorari are true to the best of his knowledge, information and belief.

John J. Hooker.

Sworn to and subscribed before me this 1st day of June, 1946.

Mary E. Myers,
(Seal) Notary Public.

My commission expires Aug. 4, 1946.

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FIDELITY DEPOSIT COMPANY OF MARYLAND,
Respondent and Appellant Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

As set out in the petition for the writ of certiorari, this suit was instituted by the Federal Savings and Loan Insurance Corporation to recover money embezzled from a local savings association. The sole question involved is whether the Federal District Court had jurisdiction of the controversy.

The plaintiff claimed the right to invoke Federal jurisdiction on the following grounds:

(1) That plaintiff is a corporation created under an Act of Congress and its capital stock is owned by the Home Owners' Loan Corporation;

(2) That the Act provided that plaintiff could sue and be sued in any court, state or federal;

(3) That the defendant in aiding in an embezzlement of funds from a local savings association violated a Federal Criminal Act which protected plaintiff.

BASIS OF JURISDICTION OF THIS COURT.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. Code, Section 347).

The opinion of the Circuit Court of Appeals was filed February 9, 1946 (Rec. p. 174).

The petition for a rehearing was filed February 27, 1946 (Rec. p. 183).

The petition for a rehearing was denied March 11, 1946 (Rec. p. 207).

SUMMARY OF THE CASE.

The complaint alleged that one Virgil Hall was employed by the Fidelity Federal Savings and Loan Association and embezzled $32,000.00 of the Association's funds. The Association kept its funds on deposit with the defendant Bank. The Association claimed that the Bank conspired with Hall to aid in the embezzlement.

The plaintiff, a corporation organized to insure the accounts in Savings and Loan Associations, in compliance with its contract to protect the accounts of the local association paid the sum of $32,000.00 to the association, and plaintiff claims that in consideration thereof the asso-

ciation assigned to it the cause of action against the Bank (Rec. pp. 82-85).

The association **really assigned irrevocably** the right to sue to six individuals, with instructions to bring suit in the name of the local association (Rec. pp. 84-5), but in order to get into the Federal Court the plaintiff claims the cause of action was assigned to the plaintiff.

The Agreement exhibited by plaintiff recites:

> "In consideration of the payment by the Federal Savings and Loan Insurance Corporation (hereinafter referred to as the 'Corporation') of the sum of $32,-361.47 to the Fidelity Federal Savings and Loan Association of Nashville, Tennessee (hereinafter referred to as the 'Association') pursuant to Section 406 (f) of the National Housing Act, as amended, for the purpose of preventing a default, the Association understands and agrees:
>
> " I. . . .
>
> " II. . . .
>
> "III. . . .
>
> " IV. The Association hereby **irrevocably** nominates, constitutes and appoints Harold Lee, Ernest K. Neumann, Robert B. Jacoby, Kenneth G. Heisler, Neal L. Thompson, and Dudley J. Scholten, being attorneys of the Corporation of Washington, D. C., hereinafter referred to as the 'Attorney-in-fact' or 'attorneys-in-fact', each to be attorney for the Association so long as he shall be such attorney of the Corporation with full power to institute, prosecute, compromise, settle, defend, or otherwise dispose of, or from time to time to appoint any attorney or attorneys, to institute, prosecute, compromise, settle, defend, or otherwise dispose of, **in the name of the Association and as and for its act and deed, all suits, actions, and claims of every nature arising out of or in connection with the losses or shortages listed in Schedule A** etc."

The cause of action was therefore irrevocably assigned to the individuals to bring suit **in the name of the Association.** The Association could not bring suit in the Federal Court, and neither could the six individuals in the name of the Association. And so the suit was brought in the name of the plaintiff.

We insist that the plaintiff has no right to invoke Federal jurisdiction, (1) Because the cause of action has been irrevocably assigned to six individuals to bring suit **in the name of the Association;** and (2) Because the controversy does not arise under the laws of the United States.

PROPOSITIONS OF LAW.

Where the question of jurisdiction of the Federal Court was doubtful, this Court has raised the question itself, and has said that it was the Court's duty to do so.

Clark v. Paul Gray, 306 U. S. 583;
United States v. Corrick, 298 U. S. 435;
Perez v. Fernandez, 202 U. S. 80;
Mansfield R. Co. v. Swan, 111 U. S. 379.

When it appears on an appeal to the Supreme Court that the Circuit Court of Appeals has acted without jurisdiction, the Supreme Court will reverse the decree of the Circuit Court of Appeals.

Stratton v. St. Louis Southwestern R. Co., 282 U. S. 10.

If on the face of the statement of its own case it does not appear that the suit really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, on the determination of which the result depends, the Circuit Court of Appeals should be reversed.

Underground Rd. v. New York, 193 U. S. 416;
Defiance Water Co. v. Defiance, 191 U. S. 184;
Western Union T. Co. v. Ann Arbor Rd. Co., 178 U. S. 239;
Blackburn v. Portland Mining Co., 175 U. S. 571;
McCain v. Des Moines, 174 U. S. 168;
Tennessee v. Union & P. Bank, 152 U. S. 454.

From the plaintiff's own statement in its complaint it can be seen that the construction of no federal Act is sought or involved. The controversy is whether the Bank aided in an embezzlement.

The Federal Act relied upon prohibits the making of false statements to the plaintiff corporation. The lawsuit is not based upon a false statement, but upon the embezzlement of money from a local association.

Opinion of Circuit Court of Appeals.

The Circuit Court of Appeals does not point out or insist that the construction of the Federal Act [12 U. S. Code 1731 (e)] is necessary, or is involved in the case. That Court cites four cases. In three of these cases the question of jurisdiction was not considered. In the fourth case (*Tunstall v. Brotherhood*, 323 U. S. 210), the suit was instituted to enforce a right **created** by a federal statute, and was rightfully brought in the Federal Court. The four cases relied upon in the lower Court are as follows:

1. *Deitrick v. Greany*, 309 U. S. 190. In this case the question involved was whether, in deciding upon the merits, the rules of decision of the state or of the general law should apply: The jurisdiction of the Court was conceded and never questioned.

2. *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447. In this case the question involved was whether, in deciding upon the merits, the rules of decision of the state or of the general law should apply. The jurisdiction of the court was conceded and never questioned. In fact, the Act creating the F. D. I. C. gives it express authority to invoke federal jurisdiction. This point was not involved.

3. *Federal Savings and Loan Ins. Corporation v. Kearney Trust Co.*, 151 Fed. (2) 720. In this case the question involved was whether, in deciding upon the merits, the rules of decision of the state or of the general law should

apply. The jurisdiction of the Court was presumed and was never questioned.

The plaintiff in that case is the same as the plaintiff in this case. But in that case the Circuit Court of Appeals did not have before it any question involving federal jurisdiction. The judge in deciding the controversy on the merits did state that it was a case "arising under the laws of the United States," but this was a voluntary dictum, unnecessary to the decision of the case. The question of federal jurisdiction was never presented to the Court, and was never intentionally determined.

4. *Tunstall v. Brotherhood*, 323 U. S. 210. This case, as stated above, clearly involved a controversy arising under a federal law, and federal jurisdiction was sustained upon the facts involved.

The Circuit Court of Appeals reversed the District Court and held that the Federal Court has jurisdiction in this case upon the ground that the defendant made a false statement for the purpose of influencing the action of the plaintiff and in violation of 12 U. S. Code, Section 1731 (e).

The Circuit Court of Appeals' Opinion stated that the plaintiff claimed the right to invoke federal jurisdiction upon two other grounds, but these grounds were not considered by that Court. We shall refer only briefly to those grounds which we believe do not warrant the claim for federal jurisdiction.

To Sue and Be Sued Clause.

The plaintiff claims that this clause [12 U. S. Code 1725 (c) 4], giving it the power to sue in any court, State or Federal, gives plaintiff the right to bring this suit regardless of any controversy arising under a federal law.

We submit that this clause does not enlarge the jurisdiction of any particular court, but puts the corporation in the same position as an individual in respect to suing and being sued. This particular point was decided long ago by Chief Justice Marshall.

Bank of United States v. Devereus, 5 Cranch. 61;
Cyc. of Fed. Procedure, 2nd Edition, Sec. 270, page 684.

Stock Ownership by H. O. L. C.

This stock ownership of plaintiff by the Home Owners' Loan Corporation we insist does not confer federal jurisdiction. The Circuit Court of Appeals evidently did not think so, and did not discuss this point. We shall refer to it only briefly.

The Federal Deposit Insurance Corporation was created in 1933 to insure deposits in banks. Its stock is owned **by the United States.** The Act creating it gives it the express authority to invoke federal jurisdiction.

12 U. S. Code, Section 264 (j).

The plaintiff was created in 1934 to insure accounts in building and loan associations. Its stock is not owned by the United States, but by the Home Owners' Loan Corporation. The Act creating it follows the F. D. I. C. Act, as to its powers, until it reaches the jurisdictional provision; the Act creating plaintiff leaves out the provision which gives F. D. I. C. federal jurisdictional rights.

Compare: 12 U. S. C. A., Section 264 (j);
12 U. S. C. A., Section 1725 (b).

We submit that although plaintiff may be a governmental agency for certain purposes (as are many other

governmental agencies, including National Banks), this fact does not give it the right to invoke federal jurisdiction unless its stock (at least one-half) is owned by the Government of the United States.

We submit that the Home Owners' Loan Corporation is a separate entity, and as Mr. Justice Cardozo said in *Petrogradsky Bank v. National City Bank*, 253 N. Y. 23:

> "The concept of corporate personality is to be kept distinct in thought from authority or agency, although they are easily confused."

Other authorities recognizing the principle of the separate entity of a corporation whose stock is owned by the state or Federal Government, or by a governmental agency, are:

Bank of U. S. v. Planters Bank, 9 Wheaton 904;
Olson v. U. S. Spruce Corporation, 267 U. S. 462;
U. S. ex rel. Skinner etc. v. McCarl, 275 U. S. 1;
U. S. v. Strang, 254 U. S. 491;
Sloan Corporation v. U. S. Fleet Corporation, 258 U. S. 549;
R. F. C. v. Menihen Corporation, 312 U. S. 81.

CONCLUSION.

We submit, from the above, that the allegations of the complaint do not establish a case that may be instituted and maintained in the Federal Court.

The allegations of the complaint affirmatively establish the fact that the cause of action originated as a local controversy between two local concerns with no Federal question involved; that the Federal Act relied upon by the Circuit Court of Appeals to create Federal jurisdiction is not involved in the lawsuit, and its construction is not

necessary to the determination of the case; and that neither the facts surrounding the creation of the plaintiff nor the facts giving rise to the controversy justify or warrant the invoking of Federal jurisdiction.

Respectfully submitted,

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APPENDIX.

OPINION.

(Filed February 9, 1946.)

Before Simons, Allen, Circuit Judges; Ford, District Judge.

Ford, District Judge. This case was dismissed by the District Court for want of jurisdiction. The only point of controversy upon this appeal is whether the plaintiff, Federal Savings and Loan Association, an instrumentality of the United States, may institute and maintain this action in the Federal Court.

The plaintiff invokes Federal jurisdiction upon three independent grounds, viz.:

I. That plaintiff is a corporate instrumentality of the Government of the United States incorporated by an Act of Congress "wherein the Government of the United States is the owner of more than one-half of its capital stock." 28 USCA § 42.

II. That the Act of Congress by and under which the plaintiff was created conferred Federal jurisdiction by express grant. 12 USCA § 1725(c)(4).

III. That this is a suit of a civil nature where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and arises under the laws of the United States. 28 USCA § 41(1)(a).

Let us first consider whether upon the face of the complaint the claim, as such, considered apart from the facts involved under grounds "I" and "II" arises under the laws of the United States, within the meaning of para-

graph 1(a) of the Judiciary Act of 1875, 28 USCA § 41(1)(a), for, if the case so arises, plaintiff's contentions in support of grounds "I" and "II," for present purposes, are superfluous.

Following the traditional policy of the National Government to clothe certain of its activities in corporate form when employment of the corporate device is more advantageous for practical purposes than the use of conventional executive agencies, by the Act of June 27, 1934, known as the "National Housing Act," 48 Stat. 1246-65, 12 USCA §§ 1724-1731, Congress created the plaintiff, Federal Savings and Loan Insurance Corporation, as a corporate instrumentality of the United States and imposed upon it the duty to insure the accounts of all Federal Savings and Loan Associations having unimpaired capital, safe financial policies for economical home financing consistent with the purposes of the Act, upon proper application for such insurance and agreement to the terms and conditions prescribed by the Act.

The complaint shows that at the time here involved the accounts of the Fidelity Federal Savings and Loan Association of Nashville, Tennessee, an institution organized under the provisions of the "Home Owners' Loan Act of 1933," 48 Stat. 128-135, 12 USCA § 1464, were insured by the plaintiff, and that from its organization in May, 1937 until about February 1, 1941, Virgil Hall was secretary and treasurer of the Association which "had its chief bank account" with the defendant Third National Bank in Nashville, a national banking institution located at Nashville, Tennessee.

The complaint, as amended, further alleges, in substance, that between the time of the organization of the Association and February 1, 1941, pursuant to a fraudulent arrangement with the treasurer of the Association, Virgil Hall, the defendant Bank made unauthorized fraudulent and illegal charges against the bank account of the

Association and thereby unlawfully converted funds of the Association aggregating $32,056.35 and wrongfully applied the same in satisfaction of Hall's personal indebtedness to the Bank; that in furtherance of the fraudulent scheme to so misapply the Association's funds, from time to time, when plaintiff's examiners were engaged in making lawful examinations as to the assets and affairs of the Association, the defendant Bank, for the purpose of deceiving the plaintiff and influencing its action, fraudulently concealed its misapplication and misappropriation of the funds of the Association by making false statements to the plaintiff's examiners in respect to the status of the accounts of the Association with the Bank; that by reason of such wrongful acts the capital of the Association became impaired; that in observance of the duty imposed upon plaintiff by the National Housing Act to prevent default by the Association, and in the exercise of the discretion conferred by the Act to preserve normal operations of the insured institution as well as to protect itself as its insurer, the plaintiff restored the capital of the Association by advancing to it the amount so wrongfully converted by the defendant; and in consideration thereof the Association assigned and transferred to the plaintiff all its claims and rights of action against the Bank on account of the wrongful acts alleged.

The National Housing Act created the plaintiff as a corporate expedient to carry out useful and important governmental functions, established a complete system for its government and control and prescribed the scope and nature of its duties. The Act also contains provisions designed to safeguard its assets and the public funds which it is authorized to administer. Section 512 of the Act, as amended, 52 Stat. 24, 25, 12 USCA § 1731, contains numerous provisions making the commission of acts, which would be detrimental and injurious to the Federal Savings and Loan Insurance Corporation, criminal offenses.

Among them is the provision that "Whoever, . . . for the purpose of influencing in any way the action of the said Corporation under this chapter, makes, passes, utters, or publishes, or causes to be made, passed, uttered or published, any statement, knowing the same to be false, . . . shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both." Section 512(e), as amended, 52 Stat. 25, 12 USCA § 1731(e).

Obviously an important purpose of this statute is to protect the Federal Savings and Loan Insurance Corporation from misrepresentations and misstatements designed to defeat prompt discovery by its examiners of fraudulent or unlawful conduct detrimental to the Corporation.

The views expressed by the District Court that "The purpose of the statute in question is to place a criminal penalty upon the commission of certain acts, and does not purport to confer jurisdiction upon the United States court to try any civil action arising out of the violation of the statute" and ". . . the alleged acts complained of are purely of a local nature and plaintiff's rights, if any, are fully governed by the common law and the laws of the State of Tennessee relating to conversion and fraud and deceit" seem to entirely overlook the fact that regardless of the laws of the state or the common law, this Act clearly and emphatically evidences the National policy to safeguard the Insurance Corporation by Federal laws to which the Corporation may resort for protection and relief from such fraudulent conduct as that alleged to have been committed by the Bank in this case and the prescribed criminal penalties are not the sole sanctions thereof. "It is the evil tendency of the prohibited acts at which the statute is aimed, and its aid, in condemnation of them, and in preventing the consequences which the Act was designed to prevent, may be invoked . . . . . it is the federal statute which condemns as unlawful

respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted, ... the judicial determination of the legal consequences which flow from acts condemned as unlawful . . . involves decision of a federal, not a state, question." *Deitrick v. Greaney*, 309 U. S. 190, 198. "Criminal penalties are no more the sole sanctions of the federal policy expressed in this Act than were the criminal penalties imposed on the agreement in the *Deitrick* case." *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U. S. 447, 461.

Upon the face of the complaint, treating the amendment tendered on January 6, 1945, as filed, as it should be, the plaintiff's claim meets the established jurisdictional test as applied in *Tunstall v. Brotherhood, etc.*, 323 U. S. 210, 213, in which the Court said: ". . . the right asserted by petitioner . . . is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' . . . The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. § 41(8), Judicial Code § 24(8); . . ."

Directly in point is *Federal Savings & Loan Insurance Corporation v. Kearney Trust Company*, 8 Cir., 151 F. (2d) 720, 721, 725, decided October 9, 1945. In that case, the Federal Savings & Loan Insurance Corporation (also the plaintiff here) as assignee of the Liberty Federal Savings and Loan Association of Liberty, Missouri, the accounts of which were insured by the plaintiff, brought

suit against Kearney Trust Company of Kearney, Missouri, to recover the amount of certain checks drawn against funds of the Association deposited in the First National Bank which were alleged to have been wrongfully credited by the Kearney Trust Company to the President of the Association and paid out on his order for use in his personal business. The Court said: "This is a case arising under the laws of the United States" and in holding that, under the rule of *Deitrick v. Greaney*, supra, the liability of the Trust Company involved decision of a Federal question and the rights of the parties were controlled by federal, not state, law, the Court observed: "If this were not true the consequences resulting from violations of the statutory prohibitions enacted by Congress for the protection of these national institutions would be subject to conflicting local laws unrelated to the uniform purpose of the Acts."

We are in accord.

The judgment of the District Court dismissing the case for want of jurisdiction is reversed and the case is remanded for proceedings consistent herewith.